

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE

February 28, 2011 Session

**LIBERTY MUTUAL INSURANCE CO. ET AL. v. RICHARD WARNOCK ET AL.**

**Appeal from the Circuit Court for Hamilton County  
No. 09C1316 Jacqueline S. Bolton, Judge**

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**No. E2010-01453-WC-R3-WC-FILED-JULY 14, 2011**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee suffered an injury which the employer denied was in the course of employment. The employee filed a request for assistance with the Tennessee Department of Labor and Workforce Development. The Department ordered the employer to pay temporary disability benefits and medical expenses for the employee's injury pursuant to Tennessee Code Annotated section 50-6-238(a)(2)(3). Subsequently the employer, its workers' compensation carrier and the employee entered into a compromise and release agreement in Pennsylvania pursuant to which the employee was paid \$130,000. The employer filed this action against the employee and the Department of Labor requesting reimbursement of payments made pursuant to the Department's order, as permitted by section 50-6-238(b). The trial court granted the Department's motion for summary judgment and dismissed the action. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and JON KERRY BLACKWOOD, SR. J., joined.

C. Scott Johnson and Samuel T. Quattrochi, Chattanooga, Tennessee, for the appellants, Liberty Mutual Insurance Company and U.S. Xpress Enterprises, Inc.

Robert E. Cooper, Jr., Attorney General and Reporter, and Joshua Davis Baker, Assistant Attorney General, for the appellee, Sue Ann Head, Administrator of the Tennessee Department of Labor and Workforce Development, Workers' Compensation Division.

## MEMORANDUM OPINION

### Factual and Procedural Background

Richard Warnock, a resident of Pennsylvania, alleged he was injured on July 8, 2007, in the course of his employment with U.S. Xpress Enterprises, Inc. (“U.S. Xpress”) of Chattanooga, Tennessee. Warnock alleged that he slipped and fell, suffering an incisional hernia while loading his employer’s truck preparatory to driving from Pennsylvania to Ohio. U.S. Xpress and its insurer Liberty Mutual denied his claim for workers’ compensation benefits. Warnock filed a Request for Assistance with the Tennessee Department of Labor and Workforce Development (“Department of Labor” or “Department”). On September 25, 2007, a workers’ compensation specialist from the Department of Labor issued an order directing U.S. Xpress to pay temporary disability and medical benefits for Warnock’s injury. U.S. Xpress sought reconsideration, but the Department of Labor affirmed each respect of the order on October 15, 2007, and further ordered an increase in the workers’ compensation benefit rate.

On December 13, 2007, U.S. Xpress and Liberty Mutual filed a Petition for Review in the Davidson County Chancery Court against Warnock, seeking review of the Department of Labor’s October 15, 2007 order pursuant to the judicial review section of the Uniform Administrative Procedures Act. See Tenn. Code Ann. § 4-5-322 (2005). The Department of Labor was not made a party to the petition for review. The petition was dismissed by the Davidson County Chancellor for lack of prosecution on December 18, 2008.

On March 10, 2009, U.S. Xpress and Liberty Mutual filed a compromise and release petition in Pennsylvania, which recited that Richard Warnock was injured on July 9, 2007, and requested approval of a compromise and release agreement between the parties. On April 2, 2009, a judge for the Bureau of Workers’ Compensation with the Pennsylvania Department of Labor and Industry granted the compromise and release petition and approved a compromise and release agreement, which was executed by the parties. The agreement called for U.S. Xpress to make a single payment of \$130,000 to Warnock in settlement of his workers’ compensation claim. The agreement stated:

The parties acknowledge that this is a full and final settlement of all past, present and future claims for medical and indemnity benefits arising out of the alleged 07/09/2007 work injury . . . All parties have read this agreement and agreed to its contents. We understand that under this agreement all petitions are resolved.

On July 14, 2009, U.S. Xpress filed a request in Tennessee for a Benefit Review Conference (“BRC”) with the Tennessee Department of Labor, which referred to the settlement of the Pennsylvania claim. On July 30, 2009, the Department issued a Benefit Review Report, stating that “[s]ince the parties have elected to settle this claim in Pennsylvania, the State of Tennessee no longer has jurisdiction over any issues related to this claim. No further judicial or administrative process is available.”

On October 16, 2009, U.S. Xpress and Liberty Mutual then filed a Petition for Review against Warnock and the Administrator of the Department of Labor's Workers' Compensation Division in Hamilton County Circuit Court, which requested the trial court to "review and reverse" the Department's September 25 and October 17, 2007 orders requiring U.S. Xpress to pay Warnock temporary disability benefits. U.S. Xpress and Liberty Mutual also requested that the court order reimbursement by the Second Injury Fund for the payments they had made.

The Department of Labor responded by filing a motion to dismiss, contending that the trial court lacked subject matter jurisdiction, the petition failed to state a claim for relief, and that the claim was barred by the applicable statute of limitations.

U.S. Xpress filed a notice of voluntary nonsuit as to the Department of Labor and a motion for default judgment against Warnock, who had yet to answer the complaint. The trial court granted the nonsuit but permitted U.S. Xpress' action against Warnock to proceed.

The Department of Labor then filed a motion to alter or amend. The Department contended that the nonsuit should not have been granted because the Department's motion to dismiss raised matters outside the pleadings and was therefore a motion for summary judgment, which precludes a nonsuit from being granted pursuant to Tennessee Rule of Civil Procedure 41.01(1). The trial court granted the motion to set aside the nonsuit order on April 7, 2010. The Department then filed a supplement to its earlier motion, which contained documents from both the administrative proceedings held in Tennessee and Pennsylvania.

U.S. Xpress filed a response that did not deny the authenticity of any of the documents submitted by the Department. However, U.S. Xpress argued that summary judgment was not appropriate because neither the Pennsylvania settlement nor the Department's BRC report "concluded" U.S. Xpress' judicial remedies in Tennessee and because Tennessee Code Annotated section 50-6-238 required U.S. Xpress to obtain a judgment from a Tennessee court to seek reimbursement for payments made pursuant to the Department's orders. The trial court granted the Department's motion for summary judgment and entered an order dismissing the case.

U.S. Xpress filed a motion to alter or amend the trial court's order, contending that the order did not "dispose of all . . . claims, namely the workers' compensation claim filed pursuant to Tenn. Code Ann. §§ 50-6-225 and 50-6-238." The trial court held that U.S. Xpress' claim under section 4-5-322 was precluded as res judicata based on the dismissal by the Davidson County Chancery Court. The court also held that the petition did not state a claim under the workers' compensation law despite the references therein to sections 50-6-225 and -238.

U.S. Xpress appeals, contending that the trial court erred in setting aside the order of nonsuit and holding that U.S. Xpress did not state a claim for relief under the workers' compensation law. U.S. Xpress further argues that it should be permitted to pursue its claim contesting Warnock's eligibility for temporary disability benefits for his April 2007 injury.

## Standard of Review

This appeal does not involve any disputed issues of fact. U.S. Xpress challenges the trial court's interpretation and application of Tennessee Rule of Civil Procedure 41.01 and Tennessee Code Annotated sections 4-5-322 and 50-6-238. "The interpretation of a statute and its application to undisputed facts involve questions of law." Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Id.; Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

## Analysis

U.S. Xpress initially contends that the trial court erred by granting the Department's motion to set aside the order of dismissal, which was entered as a result of the notice of voluntary nonsuit. U.S. Xpress argues that Rule 41.01 gives plaintiffs "an absolute right to take a nonsuit" in the absence of a pending motion for summary judgment by an adverse party. U.S. Xpress also argues that the trial court erred in holding that the Department's motion to dismiss raised matters outside the pleadings and therefore should have been treated as a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 12.02. We disagree.

U.S. Xpress' petition for review, which initiated this action, stated on its face that the action was brought pursuant to Tennessee Code Annotated section 4-5-322, the judicial review section of the Uniform Administrative Procedures Act. The Department of Labor's motion to dismiss contended that the trial court did not have subject matter jurisdiction and that U.S. Xpress failed to follow the procedures set out in section 4-5-322. In support of its contention, the Department of Labor attached to its motion to dismiss copies of the December 13, 2007 petition filed by U.S. Xpress in Davidson County Chancery Court and the December 18, 2008 order dismissing that petition. Including this additional material, in our view, provided a sufficient basis for the trial court's decision to treat the Department of Labor's motion to dismiss as a motion for summary judgment, thereby setting aside the order of voluntary dismissal. See Brick Church Transmission, Inc. v. S. Pilot Ins. Co., 140 S.W.3d 324, 328-29 (Tenn. Ct. App. 2003).

U.S. Xpress concedes that its request for reversal of the Department of Labor's September 25, 2007 order and October 17, 2007 ruling was inappropriate and it agrees that section 4-5-322 does not allow employers to "challenge the orders of the Department of Labor awarding temporary benefits." However, U.S. Xpress further contends that its petition for review also contained a claim for relief under the workers' compensation statute. We disagree.

The relief U.S. Xpress sought in its petition for review is a request that the trial court:

Reverse the prior orders of the [Department of Labor], and order that [U.S. Xpress] be refunded and reimbursed by the Second Injury Fund any and all sums paid as a

result of those orders, and for adjudication of the parties' entitlement, if any, to further relief under the Tennessee Workers' Compensation Law, and for such other and general relief to which [U.S. Xpress] may be justly entitled.

Although Warnock is named as a defendant in the petition, the petition does not request any specific relief from him. The petition also does not allege any facts that would permit U.S. Xpress to recover from Warnock. The question then becomes whether the complaint states a viable claim for relief against the Department of Labor under the workers' compensation law.

The entire thrust of U.S. Xpress's petition is that the Department of Labor's September 25 and October 15, 2007 orders were erroneous. The relief sought is a review and reversal of those orders. The orders were issued pursuant to Tennessee Code Annotated section 50-6-238(a) (2008), and the method for obtaining review of such orders is set out specifically in Tennessee Code Annotated section 50-6-238(c):

In a case where an employer or insurer has paid benefits pursuant to an order of a workers' compensation specialist, and the employer or insurer wishes to contest the compensability of the injury, then the court shall hear the issue de novo, and no presumption of correctness is given to any prior determination.

In addition, Tennessee Code Annotated section 50-6-238(b) provides that:

If a specialist has ordered the payment of benefits pursuant to this section and a court subsequently finds that the employee was not entitled to the ordered benefits, then the entity or person who paid the benefits shall be entitled to a refund of all amounts pursuant to a specialist's order or orders. The refund shall be paid from the second injury fund . . . .

These provisions make clear that the proper forum for reviewing an order to pay temporary disability benefits or provide medical care issued by the Department of Labor is a de novo trial on the merits of the claim between an employer and an employee. Accordingly, the employer seeking reimbursement must obtain a court judgment following a de novo trial finding that the employee was not entitled to benefits to receive a refund from the Second Injury Fund. The employer must send a certified copy of the judgment to the division of Workers' Compensation for reimbursement. Tenn. Code Ann. § 50-6-238(b).

U.S. Xpress did not follow these procedures. Instead, it filed its first action against Warnock in Davidson County, seeking review under the Administrative Procedures Act, and it did not add the Department of Labor as a defendant. The action was ultimately dismissed a year later for failure to prosecute. Then, U.S. Xpress filed the current petition for review in Hamilton County against both Warnock and the Department of Labor, seeking a court order for reimbursement from the Second Injury Fund. This was improper under section 50-6-238(b). U.S. Xpress should have sued Warnock under the workers' compensation laws and sought a determination as to whether the employee's

injury was compensable and whether he was entitled to the benefits. If successful, U.S. Xpress would then be required to send the judgment to the division of workers' compensation for reimbursement. However, U.S. Xpress failed to follow this statutorily mandated process for reimbursement.

Although Warnock initially sought disability benefits in Tennessee, U.S. Xpress and Liberty Mutual filed a compromise and release petition in Pennsylvania and executed a compromise and release agreement, settling Warnock's workers' compensation claim.<sup>1</sup>U.S. Xpress had the opportunity to contest the compensability of Warnock's injury in Pennsylvania. See, e.g., 77 Pa. Stat. Ann. § 710 (West, Westlaw through Act 2010-92). However, U.S. Xpress chose not to do so, precluding further review of the disputed orders.

U.S. Xpress implicitly argues that section 50-6-238(b) creates a right of action by which an employer can seek review of an administrative order to pay temporary benefits or provide medical care that is independent of the civil action between employer and employee governed by section 50-6-225(a). The plaintiff has the burden of demonstrating that a statute creates a right of action. Brown v. Tenn. Title Loans, Inc., 328 S.W.3d 850, 856 (Tenn. 2010). U.S. Xpress has failed to sustain that burden. After careful examination, we conclude that there is nothing in the language of section 50-6-238 that either expressly or implicitly creates a right of action for an employer to seek relief from an order to pay temporary disability benefits or medical expenses outside the context of an action between an employer and employee under section 50-6-225(a). In this case, the settlement of Warnock's claim in Pennsylvania resolved those issues and bars the relief sought by U.S. Xpress in this action. See Bradshaw v. Old Republic Ins. Co., 922 S.W.2d 503, 505-06 (Tenn. 1996); Tidwell v. Chattanooga Boiler & Tank Co., 43 S.W.2d 221, 223 (Tenn. 1931).

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Liberty Mutual Insurance Company and U.S. Xpress Enterprises, Inc., and their surety, for which execution may issue, if necessary.

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E. RILEY ANDERSON, SPECIAL JUDGE

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Under Pennsylvania law, Mr. Warnock's pursuit of benefits in Tennessee did not preclude him from seeking benefits in Pennsylvania. See Williams v. Workers' Comp. Appeal Bd., 4 A.3d 742, 745 (Pa. Commw. Ct. 2010).

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**JUDGMENT**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs of this appeal are taxed to Liberty Mutual Insurance Company and U.S. Express Enterprises, Inc., and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM